U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 13 2010
SRC 08 015 50195

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an oral maxillofacial surgeon. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that additional evidence or a brief would be filed within 30 days. Counsel dated the appeal July 15, 2009. As of this date, more than eight months later, this office has received nothing further. Thus, the appeal will be adjudicated based on the assertions stated on the Form I-290B, Notice of Appeal or Motion. For the reasons discussed below, we affirm the director's decision that the petitioner has not demonstrated eligibility for the benefit sought. Specifically, as will be explained in detail below, relevant precedent provides three factors that must be considered. The petitioner, however, relies on the first factor, the substantial intrinsic merit of his work, in combination with a claimed shortage (which falls under the jurisdiction of the Department of Labor) to meet the other two unrelated factors. As will be explained below, this approach is not consistent with relevant precedent.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Doctor of Dental Surgery (DDS) degree from Meharry Medical College in Nashville. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

Throughout the proceeding, counsel has asserted that the petitioner works in an "underserved" area and has performed services at the Veterans Affairs Medical Center although there is no evidence he is actually employed there or that he has an offer to continue working there. Section 203(b)(2)(B)(ii) of the Act provides for a waiver of the alien employment certification in the national interest for an "alien physician" who agrees to work full time as a physician in areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

The regulation at 8 C.F.R. § 204.12(a) confirms that "alien physician" includes only doctors of medicine and doctors of osteopathy. The petitioner is a doctor of dental surgery. Thus, he is not

eligible as an alien physician under section 203(b)(2)(B)(ii) of the Act[1] and must qualify under the reasoning set forth in *NYSDOT,* 22 I&N Dec. at 217-18. In 1999, Congress amended section 203(b)(2)(B) of the Act in direct response to *NYSDOT.* Congress, at that time, could have taken any number of actions to limit, modify, or completely reverse the precedent decision. Instead, Congress let the decision stand, apart from a limited exception for certain physicians, as described in section 203(b)(2)(B)(ii) of the Act. Congress did not include doctors of dental surgery under this law. Because Congress has made no further statutory changes in the decade since *NYSDOT,* we can presume that Congress has no further objection to the precedent decision, including the requirement that the proposed benefits be national in scope for everyone other than alien physicians.

In light of the above, the petitioner's petition will be evaluated pursuant to the factors set forth in *NYSDOT,* 22 I&N Dec. at 217-18. It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of substantial intrinsic merit, oral maxillofacial surgery. We reiterate, however, that the substantial intrinsic merit of the petitioner's work is only one of the factors set forth in *NYSDOT,* 22 I&N Dec. at 217-18. The next issue is whether the proposed benefits of the petitioner's work will be national in scope. In concluding that the proposed benefits of the alien's work in *NYSDOT* would be national in scope, that decision states:

> In reaching this conclusion, we note that the analysis we follow in "national interest" cases under section 203(b)(2)(B) of the Act differs from that for standard "exceptional ability" cases under section 203(b)(2)(A) of the Act. In the latter type of case, the local labor market is considered through the labor certification process and the activity performed by the alien need not have a national effect. For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

[1] He also did not submit the required initial evidence set forth at 8 C.F.R. § 204.12(c), such as a full-time employment contract for medical service or an employment commitment letter from a Veterans Affairs facility.

Id. at 217, n.3.

Under the heading regarding the national scope of the petitioner's work, counsel initially indicated that the petitioner would subsequently provide evidence that the petitioner works in an underserved area and serves homeless, indigent and other populations and would also subsequently submit evidence of the petitioner's work at the Veterans Medical Center in Washington, D.C. In response to the director's request for additional evidence, counsel asserts that the petitioner's services as an oral maxillofacial surgeon to U.S. war veterans from all across the United States is inherently national in scope. Counsel further asserts that the petitioner treats the homeless, crime victims and children in the United States, serving a "federal public policy [by] providing health care to a medically underserved area."

The petitioner submitted a letter from [redacted] of the Oral and Maxillofacial Surgery department at Howard University Hospital, asserting that the hospital is located in an inner city, Washington, D.C., and is part of a medically underserved area. She confirms that the hospital provides services to the homeless, indigent and other populations. Finally, she asserts that the petitioner's service for the hospital "addresses the great health care disparity in oral care in the United States." Specifically, she asserts that of the 6,000 oral and maxillofacial surgeons, only eight percent work for teaching hospitals. [redacted] does not explain why this shortage could not be addressed through the alien employment certification process, a process designed to address shortages of able, willing, qualified and available U.S. workers.

[redacted], the Attending Oral and Maxillofacial Surgeon at the Veterans Affairs Medical Center in Washington, D.C., confirms that he and the petitioner "have both practiced medicine together" at the Center and at Howard University Hospital. [redacted] confirms that the petitioner provided service to U.S. war veterans, including Iraq war veterans suffering post traumatic stress disorder (PTSD). [redacted] concludes:

> [The petitioner's] diagnosis, treatment, and evaluation has led to a more insightful and better understanding on how to deal with our veterans suffering from PTSD. Our experiences in Washington DC are shared nationally through the U.S. Department of Veterans Affairs administration. [The petitioner's] service to the U.S. in this manner is remarkable. He has been one of the very few Oral and Maxillofacial Surgeons who has take[n] care of US war veterans at the VA hospital and the indigent at the Howard University Hospital despite having more lucrative opportunities elsewhere. We need such dedicated medical practitioners in this country.

The director concluded that the petitioner's services would be limited to a specific geographic region and would be so attenuated at the national level as to be negligible. On appeal, counsel asserts that the director's decision is not "rational" and that the war veterans treated by the petitioner are from all across the United States. Counsel further asserts that the director's understanding of "in the national

interest" is "plainly and legally erroneous." Counsel concludes that the statute "does not limit 'in the national interest' to merely a geographical definition."

NYSDOT, 22 I&N Dec. at 215 is a designated precedent decision pursuant to 8 C.F.R. § 103.3(c). Thus, it is binding on all U.S. Citizenship and Immigration Services (USCIS) employees. To date, neither Congress[2] nor any other competent authority[3] has overturned the precedent decision, and counsel's opinion that it goes beyond the statute does not invalidate or overturn it.

The assertion that the petitioner provides services for an underserved population in Washington, D.C. suggests a local shortage. Without questioning the importance of securing sufficient oral care for this population, we must stress that the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221. Thus, it is not within our jurisdiction to address this issue. In addition, serving indigent or homeless patients is comparable to an attorney who performs pro bono work. As with pro bono work, while serving an underserved population as a whole may be in the national interest, the impact of an individual surgeon providing such services would be so attenuated at the national level as to be negligible.

Regarding the petitioner's service to veterans, the record still lacks evidence that the petitioner is employed at the Veterans Affairs Medical Center and, if he is, how many hours he works there. The petitioner's curriculum vitae indicates that he completed a rotation at the center while a resident at Howard University Hospital, but does not suggest that he continues to work at the center. The record does not include an offer of employment for him to continue working there. Regardless, he would be treating a limited number of veterans and, thus, the benefit at the national level would be negligible. While [redacted] concludes that the petitioner's work is national in scope, merely repeating the language of the legal requirements does not satisfy the petitioner's burden of proof.[4] [redacted] more specific assertion that the center shares information with other veterans' centers is insufficient to raise the petitioner's inherently local services to a level that is national in scope. The record does not contain internal reports authored by the petitioner and distributed to other veterans' centers,

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[2] As stated above, Congress did amend the Act to facilitate waivers for certain alien physicians. Section 203(b)(2)(B)(ii). This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *NYSDOT*; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

[3] In fact, at least two federal district court decisions have upheld the decision. *See Gennadi Mikhailik v. Alberto Gonzalez,* No. C 04-0904 FMS (N. D. Calif. May 4, 2005) (holding that the factors set forth in *NYSDOT* "provide a reasonable interpretation of what Congress intended when it created the national interest waiver." *See also Talwar v. INS*, 2001 WL 767018 (S.D.N.Y. July 9, 2001) (holding that *NYSDOT* is a "reasonable and predictable interpretation" of the statute).

[4] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. (D.C. Dist. 1990).

published materials by the petitioner, evidence that the petitioner routinely gives seminars at veterans' centers around the United States or comparable evidence that might establish the national scope of the petitioner's work.

In light of the above, we affirm the director's conclusion that the proposed benefits of the petitioner's employment at Howard University Hospital would not be national in scope as characterized in *NYSDOT,* 22 I&N Dec. at 217, n.3. It remains then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. In response to the director's request for additional evidence, counsel asserted that the interest in providing oral health care to the disadvantaged and U.S. veterans is "invaluable" and that "the national interest inherent in a labor certification process is marginal at best." This assertion is not persuasive. The alien employment certification process is capable of addressing, and in fact is designed to address, the exact type of shortages of able, willing, qualified and available U.S. workers counsel repeatedly asserts exists. Thus, it is not clear why the alleged shortage of oral surgeons willing to work with indigent or otherwise disadvantaged patients or veterans outweighs the national interest in the alien employment certification process designed to address this exact situation. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

While we do not question the importance of treating disadvantaged patients and veterans, eligibility for the waiver must ultimately rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. We reiterate that the issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submits student merit certificates and a certificate recognizing "pre-doctoral" achievement. The petitioner has not explained how these certificates demonstrate his track record of success as a practicing oral surgeon. Moreover, recognition from the petitioner's peers is one criterion for aliens of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(F). By statute, aliens of exceptional ability

are generally subject to the job offer/alien employment certification requirement; they are not exempt by virtue of their exceptional ability. Section 203(b)(2). Thus, submitting qualifying evidence under one criterion, or even the requisite three criteria, does not warrant a waiver of the alien employment certification process in the national interest. *See NYSDOT,* 22 I&N Dec. at 218, 222.

The petitioner submitted a single manuscript. While counsel characterizes this exhibit as "publications," there is no evidence that the manuscript has been published. Moreover, the record lacks evidence that this manuscript has received any attention in the field, such as evidence of citations. The petitioner also submitted letters from his immediate circle of colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole.

Ultimately, the petitioner rests on the substantial intrinsic merit of his work to meet both other factors set forth in *NYSDOT,* 22 I&N Dec. at 217-18. The substantial intrinsic merit of his work, however, while not contested, is insufficient to demonstrate that his work is either national in scope or that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications, namely those necessary to practice as an oral maxillofacial surgeon.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.